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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 ORLANDO MARTIN,

11 Plaintiff,

Case No. 2:05-cv-00557 ALA (P)

12 vs.

13 ALVARO C. TRAQUINA, et al.,

14 Defendants.

ORDER

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17 Plaintiff Orlando Martin, a prisoner confined at California State Prison-Solano  
18 (“CSP-Solano”), has brought a *pro se* civil rights action under 42 U.S.C. § 1983 against Alvaro  
19 Traquina, M.D., CSP-Solano’s Chief Medical Officer. Mr. Martin asserts that Dr. Traquina  
20 violated his Eighth Amendment right against cruel and unusual punishment by delaying and  
21 denying him medical treatment for his painful toenail condition. Dr. Traquina moves for  
22 summary judgment. For the reasons state below, the motion for summary judgment is granted.

23 **I**

24 **A**

25 Mr. Martin entered CSP- Solano on November 12, 2002. On arrival he asked  
26 prison officials to issue him soft shoes, because the standard-issue hard boots hurt his feet. The  
officials nevertheless assigned him hard boots, which caused his feet to swell and become

1 blistered.

2 On April 10, 2003 Dr. Oscar Mar examined Mr. Martin and requested that he be  
3 examined by a podiatrist. On April 24, 2003 Mr. Martin was examined again by a doctor. He  
4 was diagnosed with “buildup” on both of his big toes. The examining doctor added a second  
5 request that he see a podiatrist. Additional requests for Mr. Martin to see a podiatrist were made  
6 in May, June, July, and September of 2003.

7 On June 3, 2003, Mr. Martin wrote a letter to Dr. Traquina. According to Mr.  
8 Martin’s verified Second Amended Complaint Dr. Traquina was, as CSP-Solano’s Chief  
9 Medical Officer, “responsible for arranging medical care for prisoners . . . and specialized care  
10 outside the prison.” Mr. Martin’s letter stated:

11 I have signed-up to see the . . . Orthopedic doctor since much, I have . . . Blistes  
12 [sic] up both of my feet, I’ve been here seven months in the C.D.C. system, and  
13 still have not seen them, I talk with the “Annex” doctor’s and they say they can’t  
14 help me about my feet . . . the boots i[s] making my feet very bad, and the pain is  
15 getting worser . . . I’ve tried my counsol [sic] . . . [and] annex doctor’s, but know  
16 [sic] one seems to help, so now I come to you for your professional help.

17 Second Amended Complaint, Exh. 20. Upon receiving the letter, Dr. Traquina made a copy of it  
18 and sent it to a Dr. Toppenberg so that he could interview Mr. Martin. Second  
19 Amended Complaint, Memorandum of Points and Authorities, at 3. Mr. Martin was first  
20 examined by a podiatrist on September 12, 2003.

21 On October 27, 2003, Dr. Osborn surgically removed both of Mr. Martin’s big  
22 toenails. Mr. Martin suffers from Hepatitis-C, and therefore is not supposed to take Motrin  
23 because it hurts his liver. Mr. Martin told Dr. Osborn before the toenail-removal surgery that he  
24 had Hepatitis-C, but Dr. Osborn nevertheless prescribed him Motrin for post-operation pain. Dr.  
25 Osborn did not prescribe Mr. Martin any antibiotics, open-toed sandals, a wheelchair, crutches,  
26 or a cane. Nor did Dr. Osborn arrange for Mr. Martin to be transported back to his living  
quarters or issue Mr. Martin a medical chrono, which is a form that would have instructed prison  
personnel to bring Mr. Martin’s food to him in his quarters for one week.

Because Mr. Martin was not issued a wheelchair, given a ride back to his living

1 quarters, or issued a medical chrono, he was forced to walk almost half a mile back to his prison  
2 building after the surgery, and to walk to the dining room for his meals during the ensuing week.  
3 These trips caused Mr. Martin extreme pain and bleeding in his feet, and caused his wounds to  
4 remain open. On November 3, 2003, at Mr. Martin's follow-up medical exam, Dr. Dwayne  
5 Highsmith determined that the post-surgical site had become infected and prescribed antibiotics  
6 and additional pain medication. Mr. Martin later developed a bone spur on his right big toe,  
7 which had not been there before the surgery.

8           On each of the three days immediately following his surgery, Mr. Martin traveled  
9 to the prison clinic where Ms. Yen Dechant worked as a nurse. There, he asked Ms. Dechant for  
10 medical treatment to alleviate his pain. He showed her his toes, which were bleeding, and she  
11 gave him fresh bandages. She did not send him to see a doctor. She told him he had to wait to  
12 see a doctor until his followup visit on November 3, 2003. She stated that "the bleeding [was]  
13 normal" and would "stop in due time." Ms. Dechant stated in her declaration that Mr. Martin's  
14 feet were not infected when she examined them on October 29, 2003. She examined them again  
15 on November 3, 2003. On that date she noticed that "[h]is big toe had developed some redness  
16 and was slightly swollen with a small amount of drainage." Dechant Dec., ¶ 6. She further  
17 alleged that she did not call a doctor on November 3, 2003 because Mr. Martin was scheduled to  
18 see a doctor later that morning for his follow-up exam and there was no emergency that would  
19 warrant calling the doctor immediately. *Id.*

20           On January 16, 2004, Dr. Highsmith examined Mr. Martin and determined that he  
21 was still suffering from pain in his right toe. Dr. Daniel Bunnell examined Mr. Martin on  
22 February 4, 2004. He concluded that there was no abnormality of the bone suggesting  
23 osteomyelites. On the same date, , Dr. Traquina examined Mr. Martin and noted that he was still  
24 suffering from pain in his toe, although it had healed and showed no signs of infection.

25           On April 23, 2004, Mr. Martin was diagnosed with a bone spur on his right big  
26 toe. The next day, on April 24, 2004, Dr. Chen requested an "URGENT" consultation for Mr.

1 Martin. Mr. Martin received a consultation on June 4, 2004. Dr. Chen then issued an order  
2 authorizing the bone surgery itself, dated June 22, 2004, classifying the surgery as “routine.”  
3 Defendant’s Motion for Summary Judgment, Exh. F. Mr. Martin did not receive the bone spur  
4 removal surgery for another fifteen months. The surgery was finally performed in July 2005.

5 **B**

6 Mr. Martin filed at least two administrative complaints at CSP-Solano between  
7 2002 and 2005. He filed the first complaint in December 2003, requesting additional medical  
8 care for his feet and calling for an administrative investigation into the medical care he received  
9 from Dr. Osborn and Ms. Dechant. On February 3, 2004, Dr. Traquina issued a Second Level  
10 response to the complaint. The response stated that Mr. Martin’s request was partially granted  
11 on the ground that Mr. Martin had already received appropriate medical care, and that Dr.  
12 Traquina had interviewed Mr. Martin and ‘verified that both feet were well healed and there  
13 were no signs of infection.’ “Additionally,” Dr. Traquina said in the response, “I advised you to  
14 have a follow-up consultation with the podiatrist to discuss the x-rays results and to request soft  
15 shoes chrono.” Dr. Traquina concluded that Mr. Martin had “failed to provide evidence that  
16 proves that Dr. Osborn and RN Deschant [sic] acted unprofessionally or have neglected your  
17 medical care.” Second Amended Complaint, Exh. 10.

18 On April 7, 2004, Mr. Martin filed his second complaint: a CDC form entitled  
19 “Reasonable Modification or Accommodation Request.” He wrote on the form that the toenail  
20 removal surgery “caused me to get a ‘bone spur’ in my ‘right toe,’” and complained of blisters  
21 and pain in his foot. He requested “an[] emergency appointment with an[] outside podiatry  
22 doctor to remove the bone spur. . . .” Second Amended Complaint, Exh. 12.

23 On June 7, 2004, Dr. Traquina issued a Second Level response to the April 7,  
24 2004 complaint, stating “your appeal is partially granted in that you are receiving appropriate  
25 treatment for your post-op complications from Dr. Highsmith, who is one of our consulting  
26 physicians.” Exh. 12. The response explained that on April 23, 2004 Dr. Chen had examined

1 Mr. Martin, "noted that your wound was healing well, with no sign of infection," and concluded  
 2 that the results of an x-ray were "negative." Dr. Traquina also stated that Dr. Highsmith had  
 3 noticed on June 4, 2004 that Mr. Martin had "a slight dorsal deformity of [his] right toe," and  
 4 that Mr. Martin was scheduled to see Dr. Highsmith again in thirty days. Exh. 12. On July 19,  
 5 2004, Mr. Martin's complaint was denied at the Director's level. Exh. 12.

### 6 C

7 Mr. Martin brought a civil rights action under 42 U.S.C. § 1983 against Alvaro Traquina,  
 8 M.D., CSP-Solana's Chief Medical Officer, Randall Osborn, D.P.M., a podiatrist under contract  
 9 with CSP-Solano,<sup>1</sup> and Yen Dechant, a registered nurse employed by CSP-Solano. Mr. Martin  
 10 asserts that Defendants violated his Eighth Amendment right against cruel and unusual  
 11 punishment by delaying and denying him medical treatment for his painful toenail condition. On  
 12 September 21, 2006, defendants DeChant, Osborn and Traquina, M.D., filed motions for  
 13 summary judgment. *See* Docket Nos. 50-52. On August 3, 2007, this court granted summary  
 14 judgment in favor of Ms. Dechant and Dr. Osborn, and in favor of Dr. Traquina to the extent that  
 15 Mr. Martin claims Dr. Traquina failed to obtain a soft shoe chrono for him. Summary judgment  
 16 was denied with respect to Mr. Martin's claim that Dr. Traquina was deliberately indifferent by  
 17 delaying Mr. Martin's bone-spur removal surgery. The Court explained:

18 Dr. Traquina's response provides no explanation as to why eleven months  
 19 have passed without Mr. Martin receiving the bone spur-removal surgery  
 20 that Doctor Ch[e]n stated should have been done within twenty-four  
 21 hours. This evidence is sufficient to create a triable issue of fact as to  
 22 whether Dr. Traquina acted with deliberate indifference. *See Farrow*, 320  
 23 F.3d 1235, 1246-47 (11th Cir. 2003) (triable issue of fact existed as to  
 24 deliberate indifference, where plaintiff prisoner suffered a "substantial and  
 25 inordinate delay" in receiving dentures and his dentist was aware he was  
 26 experiencing pain, bleeding gums, and weight loss due to lack of  
 dentures); *Hunt v. Dental Department*, 865 F.2d 198, (9th Cir. 1989) (defendant prison medical administrator, dentist, and medical assistant not entitled to summary judgment on plaintiff prisoner's Eighth-Amendment claim arising from a three-month delay in receiving dentures, where defendants knew the lack of dentures was causing severe pain, weight loss, and permanent damage to plaintiff's teeth); *Hathaway v. Coughlin*, 841 F.2d 48, 50-51 (2nd Cir. 1988) (reversing summary judgment in favor of defendant prison administrators on plaintiff prisoner's claim that defendants acted with deliberate indifference in causing a delay of over

1 two years in arranging for surgery to correct broken pins in plaintiff's  
2 hip).

3 Doc. No. 65.

4 Dr. Traquina filed a second motion for summary judgment after the pretrial statements  
5 were filed (Doc. No. 77). Dr. Traquina argued that, because Mr. Martin had failed to list any  
6 trial witnesses in his pretrial statement, he would be unable to prove at trial that he suffered from  
7 a serious medical condition. Dr. Traquina also argued that Mr. Martin would be unable to  
8 authenticate any of his exhibits at trial because he did not intend to call any witnesses. The  
9 Court denied this motion as moot because it granted Mr. Martin leave to amend his pretrial  
10 statement to add witnesses and also leave to take discovery of expert witnesses (Doc. No. 81).  
11 The Court also allowed defendant "120 days from the date of this order to file and serve a  
12 dispositive motion related to discovery of Plaintiff's two witnesses, Dr. Chen and Dr. Dwayne  
13 Highsmith." (Doc. No. 86).

14 On April 22, 2008, Dr. Traquina filed a third motion for summary judgment, as to  
15 the remaining claim. Dr. Traquina asserts: (1) Dr. Traquina did not cause any delay of Mr.  
16 Martin's bone spur surgery; delay of Mr. Martin's surgery was caused by circumstances beyond  
17 Dr. Traquina's control; (2) Mr. Martin's bone spur was not a serious medical condition;  
18 (3) Assuming, arguendo, that Dr. Traquina caused a delay in Mr. Martin's bone spur surgery, Dr.  
19 Traquina was not aware that delay of Mr. Martin's routine and elective surgery  
20 would cause Mr. Martin serious harm; (4) Assuming, arguendo, that Dr. Traquina caused a delay  
21 in Mr. Martin's bone spur surgery, the delay did not cause Mr. Martin any harm; and (5) Mr.  
22 Martin cannot establish a genuine issue of material fact with expert testimony.

## 23 II

### 24 A

25 Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary  
26 judgment may be granted in favor of a party "if the pleadings, depositions, answers to  
interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

1 genuine issue as to any material fact and that the moving party is entitled to judgment as a matter  
2 of law." A party's motion for summary judgment must be granted "after adequate time for  
3 discovery and upon motion . . . against a party who fails to make a showing sufficient to  
4 establish the existence of an element essential to that party's case, and on which that party will  
5 bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

6 "On summary judgment the inferences to be drawn from the underlying facts contained in  
7 such materials must be viewed in the light most favorable to the party opposing the motion."  
8 *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). "The moving party bears the initial  
9 burden to demonstrate the absence of any genuine issue of material fact." *Horphag Research*  
10 *Ltd. v. Garcia*, 475 F.3d 1029, 1035 (9th Cir. 2007). "Once the moving party meets its initial  
11 burden, however, the burden shifts to the non-moving party to set forth, by affidavit or as  
12 otherwise provided in Rule 56, specific facts showing that there is a genuine issue for trial." *Id.*  
13 (internal quotation marks omitted).

14 Where the party resisting a motion for summary judgment is *pro se*, the court "must  
15 consider as evidence in his opposition to summary judgment all of [his] contentions offered in  
16 motions and pleadings, where such contentions are based on personal knowledge and set forth  
17 facts that would be admissible in evidence, and where [he] attested under penalty of perjury that  
18 the contents of the motions or pleadings are true and correct." *Jones v. Blanas*, 393 F.3d 918,  
19 923 (9th Cir. 2004) (holding that allegations contained in a *pro se* plaintiff's verified pleadings  
20 must be considered as evidence for purposes of summary judgment).

21 Here, Mr. Martin's complaint is verified and, thus, will be considered as evidence for  
22 purposes of summary judgment. Mr. Martin filed an opposition to Defendant's motion for  
23 summary judgment (Doc. No. 106). He did not attest under the penalty of perjury to any of the  
24 contentions he set forth in this document.

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**B**

Under 42 U.S.C. § 1983, to maintain an Eighth Amendment claim based on prison medical treatment, an inmate must show “deliberate indifference to serious medical needs.” *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (citing *Estelle v. Gamble*, 429 U.S. 97, 104, (1976)). In the Ninth Circuit, the test for deliberate indifference consists of two parts. *Id.* (citing *McGuckin v. Osborn*, 974 F.2d 1050 (9th Cir. 1991), overruled on other grounds by *WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997) (en banc)). First, the plaintiff must show a “serious medical need” by demonstrating that “failure to treat a prisoner's condition could result in further significant injury or the ‘unnecessary and wanton infliction of pain.’ ” *Id.* (citing *Estelle*, 429 U.S. at 104). Second, the plaintiff must show the defendant's response to the need was deliberately indifferent. *Id.* This second prong-defendant's response to the need was deliberately indifferent-is satisfied by showing (a) a purposeful act or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference. *Id.* Indifference “may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison physicians provide medical care.” *Id.* (quoting *Hutchinson v. United States*, 838 F.2d 390, 392 (9th Cir.1988)). Yet, an “inadvertent [or negligent] failure to provide adequate medical care” alone does not state a claim under § 1983. *Id.* (citing *Estelle*, 429 U.S. at 105). A prisoner need not show his harm was substantial; however, such would provide additional support for the inmate's claim that the defendant was deliberately indifferent to his needs. *Id.* at 1060. If the harm is an “isolated exception” to the defendant's “overall treatment of the prisoner [it] ordinarily militates against a finding of deliberate indifference.” *Id.* (citations omitted).

Mr. Martin claims that: (1) pursuant to California Administrative Code, title 15, section 3350 (b) (1), (4), and (5), and CDCR’s Health Care Services Request Form, form CDC 7362, the delay in his surgery was too long, and (2) that Dr. Traquina was responsible for the eleven month delay in Mr. Martin’s surgery. Mr. Martin does not present evidence to support



1 either contention.

2 Mr. Martin contends that the delay in his surgery was too long according to  
3 California Administrative Code, title 15, section 3350 (b) (1), (4), and (5), and CDCR's Health  
4 Care Services Request Form, form CDC 7362, attached as exhibit 42 to Mr. Martin's complaint.  
5 California Administrative Code, title 15, section 3350 (b) (1), (4), and (5), entitled Provision of  
6 Medical Care and Definitions, provides:

7 (b) For the purposes of this article, the following definitions apply:

8 (1) Medically Necessary means health care services that are determined by the  
9 attending physician to be reasonable and necessary to protect life, prevent  
significant illness or disability, or alleviate severe pain, and are supported by  
health outcome data as being effective medical care.

10 (4) Severe pain means a degree of discomfort that significantly disables the  
patient from reasonable independent function.

11 (5) Significant illness and disability means any medical condition that causes or  
12 may cause if left untreated a severe limitation of function or ability to perform the  
daily activities of life or that may cause premature death.

13 The regulations establish no time-limits for "routine" medical care. The regulations do confirm  
14 that Mr. Martin's doctors were authorized to classify his bone spur as "medically necessary,"  
15 which in this case, Mr. Martin's doctors did not do. Further, CDCR's Health Care Services  
16 Request Form, a CDC 7362 form, is a form to be completed by inmates to request medical  
17 services. The form to be filled out by physicians, a CDC 7243 form, which Dr. Chen used to  
18 request authorization for Mr. Martin's surgery (Defendant's Motion for Summary Judgment,  
19 Exh. F), sets forth no time requirements for requests for routine medical procedures.

20 Here, the record indicates that Mr. Martin's surgery was not classified as  
21 "urgent." On April 24, 2004, Dr. Chen prepared a Physician Request for Services ("RFS"), a  
22 CDC 7243 form, requesting that Mr. Martin consult with Dr. Highsmith concerning surgery on a  
23 possible bone spur on his right great toe. Dr. Chen marked this RFS as "urgent." Defendant's  
24 Motion for Summary Judgment, Exh. B. This RFS, however, was a request for urgent podiatry  
25 *consultation*, not urgent surgery. Mr. Martin received the prescribed consultation on June 4,  
26 2004. *Id.* Mr. Martin does not challenge the delay in receiving this "urgent" consultation. Dr.

1 Chen's RFS authorizing the bone surgery itself, dated June 22, 2004, classifies the surgery as  
2 "routine." Defendant's Motion for Summary Judgment, Exh. F. This RFS did not indicate that  
3 the surgery was urgent or should be performed within a specified time limit. Based on the  
4 record, no reasonable juror would conclude that the surgery itself was "urgent," but rather that  
5 the consultation ordered on April 24, 2004 was classified as "urgent."

6 In his motion for summary judgment, Dr. Traquina argues that he did not cause  
7 any delay in Mr. Martin's bone spur surgery. The original surgery date was set for August 20,  
8 2004. Dr. Traquina asserts that date was delayed for the following reasons, all of which were out  
9 of his control: (1) the contracted for surgical facility was unavailable for the original date set for  
10 surgery; (2) there was a backlog of six months for podiatry consultants; (3) the contract between  
11 CSP Solano and the Northern Solano Surgery Center expired on September 30, 2004, causing a  
12 backlog in outpatient surgeries, further delaying Mr. Martin's already postponed surgery.

13 Traquina Decl., ¶ 10.

14 In his opposition to the motion for summary judgment, Mr. Martin asserts that Dr.  
15 Traquina could have contacted a different hospital and conduct the surgery elsewhere. Plaintiff's  
16 Opposition to Defendant's Motion for Summary Judgment at 5. Mr. Martin does not present any  
17 other evidence indicating Dr. Traquina caused any delay of Mr. Martin's bone spur surgery. To  
18 avoid summary judgment, Mr. Martin must present some "significant probative evidence  
19 tending to support" the allegations. *Gen. Bus. Sys. v. N. Am. Philips Corp.*, 699 F.2d 965, 971  
20 (9th Cir.1983) (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968)).  
21 Here, Mr. Martin's opposition to the motion for summary judgment was not verified. He presents  
22 no other admissible evidence to support his claim that Dr. Traquina caused the eleven month  
23 delay in his surgery.

24 Therefore, Dr. Traquina is entitled to judgment as a matter of law.

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26 Accordingly, IT IS HEREBY ORDERED that:

1 1. Defendant Traquina's motion for summary judgment is GRANTED.

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3 DATED: June 12, 2008

4 /s/ Arthur L. Alarcón  
5 UNITED STATES CIRCUIT JUDGE  
6 Sitting by Designation  
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